IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1974

NO. 73-1708

KEVIN J. BURNS, Individually and in his capacity as Commissioner of the State of Iowa Department of Social Services; and MICHAEL RYAN, Individually and in his capacity as Director of the Scott County Department of Social Services,

Petitioners,

vs.

LINDA ALCALA, JANE DOE and JOAN ROE, Individually and on behalf of all other persons similarly situated,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Iowa

BRIEF OF THE STATE OF ARIZONA AMICUS CURIAE IN SUPPORT OF PETITION

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The State of Arizona, as amicus curiae, respectfully supports the petition of KEVIN J. BURNS, Commissioner of the State of Iowa, Department of Social Services; and MICHAEL RYAN, Director of the Scott County, Department of Social Services, praying that a Writ of Certiorari issue to the United States Court of Appeals for the Eighth Circuit. For Opinions Below, Jurisdiction, Questions Presented, Constitutional and Statutory Provisions and Regulations involved and Statement of the case, see the petition.

STATEMENT OF THE INTEREST OF THE STATE OF ARIZONA

The State of Arizona participates in the Aid to Families with Dependent Children Program (hereinafter called "AFDC"). The Arizona Department of Economic Security has a policy not to grant AFDC benefits to a pregnant woman for the fetus and the would-be mother until the actual birth of the child.

Claiming that the actions of the defendants violate the Supremacy Clause and federal statutory law in that they have restricted eligibility for AFDC benefits to exclude persons eligible under federal statutes and regulations, namely, 42 U.S.C. 606 (a), and 45 C.F.R. § 233.90 (c) (2) (ii), a complaint with accompanying

Motions to proceed in Forma Pauperis, for Temporary Restraining Order and for Class Action was filed in the United States District Court for the District of Arizona against the Arizona Department of Economic Security, Janice Fitzgerald, et al v Mayo, et al, Civ. 74-124 Tuc.

The District Court of Arizona, on the 29th day of July, 1974, ordered that Defendants be restrained and enjoined from denying the AFDC application of Plaintiffs, Fitzgerald and Lopez and the class they represent of persons similarly situated solely because the applicant's child is not yet born, and further ordered that Defendant, William J. Mayo, Director of the Arizona Department of Economic Security, shall direct all Districts of the Arizona

Department of Economic Security to consider all unborn children as children for AFDC purposes as of the date pregnancy has been medically determined. The preliminary injunction to be in full force and effect until such time as the case may be heard and determined on the merits.

An appeal was taken to the Ninth Circuit Court of Appeals, No. 74-2637 where on the 20th day of September, 1974, a Stay was obtained pending appeal insofar as it applied to the Plaintiff-Appellee class other than the two-named Plaintiffs. Defendants-Appellants' Opening Brief for the appeal was filed on the 16th day of October, 1974.

Arizona is vitally interested in the

health, care and well-being of pregnant women and in alleviating the mortality rate of infants and mothers as well as the prevention of malnourishment and mental retardment of children. As pointed out in the argument, Arizona has several programs devoted to this field. Arizona is very much concerned over being ordered to make additional assistance payments in the AFDC program when it has provided other programs to take care of the problem. Thus the State of Arizona has a paramount interest in the determination by this Court on the Petition for Certiorari filed in this action. Arizona supports the Petition.

ARGUMENT

THAT THE STATES ARE NOT REQUIRED TO PROVIDE ASSISTANCE PAYMENT BENEFITS FOR THE UNBORN THROUGH THE AFDC PROGRAM IS DEMONSTRATED BY THE ENACTMENT BY CONGRESS OF PROGRAMS TO ALLEVIATE THE PLIGHT OF THE PREGNANT WOMAN AND THE UNBORN CHILD BY PROVIDING NUTRITIONAL ASSISTANCE.

Arizona supports the following arguments made by Petitioner that:

"...The decision below denies the authority of the Department of Health, Education and Welfare to allow states optional participation in extending AFDC benefits to unborn children, and moreover, changes HEW regulations which for over

30 years merely allowed such option, into a mandatory eligibility requirement for state participation in the AFDC program. As the Circuit Court noted, 19 jurisdictions presently elect to pay benefits to unborn children, while 35 jurisdictions, including Iowa do not." (Pet. pp 4-5).

"With respect to the equities inherent in a case of this nature, Petitioners point out that the question here is not whether the unborn ought to receive nutritional and medical assistance from society, but whether the States are required to provide such assistance through the AFDC program. The Circuit Court overlooked alternative programs cited by Petitioners, which are available to meet these needs, including food stamps, commodities, and general relief. Title V of the Social Security Act-

Maternal and Child Welfare--is another source of assistance to the unborn. (Title V is totally separate from the AFDC program, Title IV of the Social Security Act.)" (Pet. p. 9).

That the States are not required to provide such assistance payments for the unborn through the AFDC program is further demonstrated by the fact that Congress added to the Child Nutrition Act of 1966, Pub. L. 89-642, Oct. 11, 1966, 80 Stat. 885, a new Section 17, Pub. L. 92-433, §9, Sept. 26, 1972, 86 Stat. 729, 42 U.S.C. 1786, Special Supplemental Food Program for Women, Infants and Children (WIC Program) Appendix A.

To further bolster the program, the latest amendment, Public Law 93-326, effective June 30, 1974, increased the annual

appropriation from $40,000,000 to $100,000,000. Appendix B. page three.

If Arizona had to pay for the pregnant women and the unborn children in the AFDC Program an estimate of the cost for the fiscal year of 1975 would total $718,500.00 in State and Federal funds.

The Arizona State Department of Health Services for the fiscal year of 1975 will administer the WIC program of wholly federal grants in the total amount of $2.732,800.00.

Here would be a definite duplication of grants for the identical purpose to provide for the health and well being of the pregnant women and children to be born in supplying their nutritional needs. Not only would the pregnant women have their nutritional needs taken care of in the WIC program, but,

putting them and the unborn on the AFDC rolls would give the pregnant women additional welfare funds.

Arizona began implementing the WIC Program in January, 1974, in the largest populated county, Maricopa, and several other counties and several of the larger Indian Reservations. Pima County, containing Tucson, the second largest city in Arizona, began the program in May, 1974. At present all but two counties are included in the program.

The program is administered by the Arizona State Department of Health Services, pursuant to the following regulations: 7 C.F.R. 246. (Added) July 13, 1973; 7 C.F.R. 246.4 (Revised) March 11, 1974; and 7 C.F.R. 246.1 (a), (Amended) July 1, 1974.

This Department also administers Title V of the Social Security Act §501, et seq. (codified as 42 U.S.C. 701 et seq.) Maternal and Child Health and Crippled Children's Services.

In addition to all the foregoing services indigent pregnant women not receiving AFDC benefits are entitled for the third trimester of pregnancy to General Assistance benefits, which are wholly state funded. If serious medical problems exist General Assistance is provided at any stage of pregnancy. Thus, with the pregnant women with children already on the AFDC rolls, all eligible pregnant women are able to receive food stamps, medical assistance and hospitalization.

With such concern by Congress over the circumstances of indigent pregnant

women especially in the problem of properly meeting the pregnant woman's nutritional needs it can be seen that Congress did not intend to include the "unborn child" in the AFDC program but attempts to meet the problem by other programs.

CONCLUSION

Amicus request that this Honorable Court review and correct the decision of the Circuit Court for settlement of the problem in Iowa, Arizona and the other sovereign states of the United States.

Respectfully submitted:

N. WARNER LEE
The Attorney General

PETER SOWNIE
Assistant Attorney General

APPENDIX "A"

CHAPTER 13A.—CHILD NUTRITION

Sec.

1786. Special supplemental food program [New]
(a) Cash grants to state health departments, Indians, and other agencies for supplemental food to pregnant and lactating women and infants.
(b) Authorization of appropriations.
(c) Limitation of administrative costs.
(d) Determination of eligibility
(e) Medical records; reports to Congress.
(f) Definitions.

§ 1786. Special supplemental food program—Cash grants to state health departments, Indians, and other agencies for supplemental food to pregnant and lactating women and infants.

(a) During each of the fiscal years ending June 30, 1973, June 30, 1974, and June 30, 1975, the Secretary shall make cash grants to the health department or comparable agency of each State; Indian tribe, band, or group recognized by the Department of the Interior; or the Indian Health Service of the Department of Health, Education, and Welfare for the purpose of providing funds to local health or welfare agencies or private nonprofit agencies of such State; Indian tribe, band, or group recognized by the Department of the Interior; or the Indian Health Service of the Department of Health, Education, and Welfare serving local health or welfare needs to enable such agencies to carry out a program under which supplemental foods will be made available to pregnant or lactating women and to infants determined by competent professionals to be nutritional risks because of inadequate nutrition and inadequate income. Such program shall be operated for a three-year period and may be carried out in any area of the United States without regard to whether a food stamp program or a direct food distribution program is in effect in such area.

Authorization of appropriations

(b) In order to carry out the program provided for under subsection (a) of this section during the fiscal year ending June 30, 1973, the Secretary shall use $20,000,000 out of

funds appropriated by section 612c of Title 7. In order to carry out such program during the fiscal year ending June 30, 1974, there is authorized to be appropriated the sum of $20,000,000, but in the event that such sum has not been appropriated for such purpose by August 1, 1973, the Secretary shall use $20,000,000, or, if any amount has been appropriated for such program, the difference, if any, between the amount directly appropriated for such purpose and $20,000,000, out of funds appropriated by section 612c of Title 7. In order to carry out such program during the fiscal year ending June 30, 1975, there is authorized to be appropriated the sum of $40,000,000, but in the event that such sum has not been appropriated for such purpose by August 1, 1974, the Secretary shall use $40,000,000, or, if any amount has been appropriated for such program, the difference, if any, between the amount directly appropriated for such purpose and $40,000,000, out of funds appropriated by section 612c of Title 7. Any funds expended from such section 612c to carry out the provisions of subsection (a) of this section shall be reimbursed out of any supplemental appropriation hereafter enacted for the purpose of carrying out the provisions of such subsection, and such reimbursements shall be deposited into the fund established pursuant to such section 612c, to be available for the purpose of such section.

Limitation of administrative costs

(c) Whenever any program is carried out by the Secretary under authority of this section through any State or local or nonprofit agency, he is authorized to pay administrative costs not to exceed 10 per centum of the Federal funds provided under the authority of this section.

Determination of eligibility

(d) The eligibility of persons to participate in the program provided for under subsection (a) of this section shall

determined by competent professional authority. Participants shall be residents of areas served by clinics or other health facilities determined to have significant numbers of infants and pregnant and lactating women at nutritional risk.

Medical records; reports to Congress

(e) State or local agencies or groups carrying out any program under this section shall maintain adequate medical records on the participants assisted to enable the Secretary to determine and evaluate the benefits of the nutritional assistance provided under this section. The Secretary and Comptroller General of the United States shall submit preliminary evaluation reports to the Congress not later than October 1, 1974; and not later than March 30, 1975, submit reports containing an evaluation of the program provided under this section and making recommendations with regard to its continuation.

Definitions

(f) As used in this section--

(a) "Pregnant and lactating women" when used in connection with the term at "nutrition risk" includes mothers from low-income populations who demonstrate one or more of the following characteristics: known inadequate nutritional patterns, unacceptably high incidence of anemia, high prematurity rates, or inadequate patterns of growth (underweight, obesity, or stunting). Such term (when used in connection with the term "at nutritional risk") also includes low-income individuals who have a history of high-risk pregnancy as evidenced by abortion, premature birth, or severe anemia.

(2) "Infants" when used in connection with the term "at nutritional risk" means children under four years of age who are in low-income populations which have shown a deficient pattern of growth, by minimally acceptable standards, as reflected by an excess number of children in the lower percentiles of height and weight. Such term, when used in connection with "at nutritional risk", may

also include (at the discretion of the Secretary) children under four years of age who (A) are in the parameter of nutritional anemia, or (B) are from low-income populations where nutritional studies have shown inadequate infants diets.

(3) "Supplemental foods" shall mean those foods containing nutrients known to be lacking in the diets of populations at nutritional risks and, in particular, those foods and food products containing high-quality protein, iron calcium, vitamin A, and vitamin C. Such term may also include (at the discretion of the Secretary) any food product commercially formulated preparation specifically designed for infants.

(4) "Competent professional authority" includes physicians, nutritionists, registered nurses, dieticians, or State or local medically trained health officials, or persons designated by physicians or State or local medically trained health officials as being competent professionally to evaluate nutritional risk.

Pub.L. 89–642, § 17, as added Pub.L. 92–433, § 9, Sept. 26, 1972, 86 Stat. 729, and amended Pub.L. 93–150, § 6, Nov. 7, 1973, 87 Stat. 563.

1973 Amendment. Subsec. (a), Pub.L. 93-150. § 6(a), provided for cash grants during fiscal year ending June 30, 1975, substituted in first sentence in two instances "State; Indian tribe, band, or group recognized by the Department of the Interior; or the Indian Health Service of the Department of Health, Education, and Welfare" for "State" and substituted in second sentence provision for operation of the program for a "three-year" rather than a "two-year" period.

Subsec. (b). Pub.L. 93-150. § 6(b). authorized appropriation of $10,000,000 for fiscal year ending June 30, 1975, and provided that in the event such sum was not appropriated by August 1, 1974, the Secretary was to use $10,000,000, or, if any amount had been appropriated, the difference, if any, between the amount directly appropriated and $10,000,000, out of funds appropriated by section 612c of Title 7.

Subsec. (c). Pub.L. 93 150. § 6(c). extended dates for submission of preliminary and final evaluation reports from October 1, 1973, to October 1, 1974, and from March 30, 1974 to March 30, 1975, respectively.

Legislative History. For legislative history and purpose of Pub.L. 92-433. see 1972 U.S. Code Cong. and Adm. News. p. 3380. See, also, Pub.L. 93-150, 1973 U.S. Code Cong. and Adm. News, p.———.

APPENDIX "B"

Public Law 93-326
93rd Congress, H.R. 14354
June 30, 1974

AN ACT 88 STAT. 286

To amend the National School Lunch Act, to authorize the use of certain funds to purchase agricultural commodities for distribution to schools, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "National School Lunch and Child Nutrition Act Amendments of 1974". National School Lunch and Child Nutrition Act Amendments of 1974.

Commodity Distribution Program

Sec. 2. The National School Lunch Act (42 U.S.C. 1751 et seq.) is amended by redesignating section 14 as section 15 and by inserting immediately after section 13A the following new section: 42 USC 1751 note. 87 Stat. 560. 42 USC 1763. 42 USC 1762.

"Commodity Distribution Program

"Sec. 14. Notwithstanding any other provision of law, the Secretary, during the period beginning July 1, 1974, and ending June 30, 1975, shall— 42 USC 1762a.

"(1) use funds available to carry out the provisions of section 32 of the Act of August 24, 1935 (7 U.S.C. 612c) which are not expended or needed to carry out such provisions, to purchase (without regard to the provisions of existing law governing the expenditure of public funds) agricultural commodities and their products of the types customarily purchased under such section, for donation to maintain the annually programmed level of assistance 49 Stat. 774.

for programs carried on under this Act, the Child Nutrition Act of 1966, and title VII of the Older Americans Act of 1965; and

80 Stat. 885.
42 USC 1771 note.

"(2) if stocks of the Commodity Credit Corporation are not available, use the funds of such Corporation to purchase agricultural commodities and their products of the types customarily available under section 416 of the Agricultural Act of 1949 (7U.S.C. 1431), for such donation.".

86 Stat. 88;
87 Stat. 56.
42 USC 3045.
68 Stat. 458;
86 Stat. 1492.

Level of Commodity Assistance

Sec. 3. Section 6 of the National School Lunch Act is amended by adding at the end thereof the following new subsection:

60 Stat. 231;
87 Stat. 562.
42 USC 1755.

"(e) For the fiscal year ending June 30, 1975, and subsequent fiscal years, the national average value of donated foods, or cash payments in lieu thereof, shall not be less than 10 cents per lunch, and that amount shall be adjusted on an annual basis each fiscal year after June 30, 1975, to reflect changes in the series for food away from home of the Consumer Price Index published by the Bureau of Labor Statistics of the Department of Labor. Such adjustment shall be computed to the nearest one-fourth cent. Among those commodities delivered under this section, the Secretary shall give special emphasis to high protein foods, meat, and meat alternates.".

High protein foods, emphasis.

Income Guidelines for Reduced Price Lunches

Sec. 4. The last sentence of section 9(b) of the National School Lunch Act is amended by striking out "for the fiscal year ending June 30, 1974" and inserting in lieu thereof, "beginning with the fiscal year ending June 30, 1974".

86 Stat. 726;
87 Stat. 564.
42 USC 1758.

Appropriation Authorization for Nonfood Assistance

Sec. 5. The Child Nutrition Act of 1966 (42 U.S.C. 1771-1786) is amended by striking out "$20,000,000" in the first sentence of section 5(a) and inserting in lieu thereof "$40,000,000". 84 Stat. 208; 86 Stat. 727. 42 USC 1774.

Special Supplemental Food Program

Sec. 6 The third sentence of section 17(b) of the Child Nutrition Act of 1966 is amended by striking out "$40,000,000" each place it appears and inserting in lieu thereof "$100,000,000". 86 Stat. 729; 87 Stat. 563. 42 USC 1786.

Technical Amendment

Sec. 7. The first sentence of section 3 of the National School Lunch Act is amended by striking out "sections 11 and 13" and inserting in lieu thereof "section 13". 76 Stat. 944; 82 Stat. 117. 42 USC 1752.

Approved June 30, 1974.

CERTIFICATE OF SERVICE

I, PETER SOWNIE, Assistant Attorney General, for the State of Arizona, hereby certify that on this 15th day of November, 1974, three (3) copies each of the Brief of the State of Arizona, Amicus Curiae in Support of Petition were air-mailed, postage prepaid to:

Lorna Lawhead Williams
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Counsel for Petitioner

and

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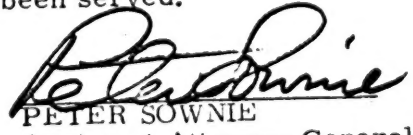
Counsel for Respondents

I further certify that all parties required to be served have been served.



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